Filed 12/13/01

NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

TOM ALSKY, Plaintiff and Appellant, v. CITY OF ADELANTO, Defendant and Respondent.	E029314 (Super.Ct.No. VCV 019967) OPINION

APPEAL from the Superior Court of San Bernardino County. Kirtland L. Mahlum, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Bruggeman, Smith & Peckham and Harry C. Carpelan for Plaintiff and Appellant.

Higgins Harris Sherman & Rohr, William J. Rohr and Michael L. Smith for Defendant and Respondent.

Plaintiff Tom Alsky appeals from a judgment of dismissal, following an order sustaining, without leave to amend, defendant City of Adelanto's demurrer to the fifth cause of action of plaintiff's second amended complaint. The fifth cause of action was the only cause of action asserted against the City of Adelanto (defendant). Plaintiff also appeals the trial court's denial of his motion for new trial after the demurrer.

Plaintiff contends the trial court erred in sustaining defendant's demurrer to the fifth cause of action for public nuisance on the ground plaintiff does not have standing to bring a public nuisance cause of action. Plaintiff claims he has standing because he suffered an injury differing in kind from that suffered by the general public.

Defendant argues the trial court correctly concluded that plaintiff's injury merely differed in degree from the general public's injury. Defendant also contends it did not owe plaintiff any duty of care and plaintiff's public nuisance claim is barred under Business and Professions Code section 25602 and by governmental immunities provided in Government Code sections 818.4 and 818.2. Defendant further argues that plaintiff's claim against defendant is defective because plaintiff did not verify his complaint.

We conclude that, although the trial court erred in ruling that plaintiff did not have standing to allege a public nuisance claim, plaintiff failed to allege a public nuisance cause of action since defendant did not owe plaintiff a duty of care and the RAVE event, as a matter of law, was not the legal or proximate cause of plaintiff's injuries. As there were valid grounds for sustaining defendant's demurrer, denial of plaintiff's motion for new trial based on legal error does not constitute reversible error, and we accordingly affirm the judgment.

1. Facts and Procedural Background

Defendant issued a conditional use permit and business license to codefendant music promoters, Entertainment One, Tran Phan, and Jason Valdez, permitting them to hold a one-time, 10-hour dance party, referred to as a RAVE party, at Maverick Stadium, on

defendant's property. The RAVE party was held on September 18, 1999, from 9:00 p.m., to the following morning at 7:00 a.m.

As Cynthia Sikes was driving home from the RAVE party, during the early morning of September 19, 1999, at around 6:00 a.m., she drove her vehicle into oncoming traffic on U.S. Highway 395 in San Bernardino and struck plaintiff's vehicle, causing plaintiff to sustain serious physical injuries. Craig Leras attended the RAVE party with Sikes and allegedly sold her illegal drugs.

Following the accident, Sikes was arrested and pled guilty to violation of Vehicle Code section 23153, subdivision (a), driving a vehicle while under the influence of an illegal drug, Ecstasy, causing bodily injury to another person.

Plaintiff filed a complaint, first amended complaint, and second amended complaint for personal injuries against defendant city and codefendants Sikes, Craig Leras, One Entertainment, Tran Phan, and Jason Valdez. The only cause of action in the second amended complaint against defendant city was the fifth cause of action for public nuisance. Defendant city demurred to the fifth cause of action.

On February 21, 2001, the trial court heard and sustained defendant's demurrer, without leave to amend, on the ground plaintiff did not have standing to assert a public nuisance claim. The court granted plaintiff leave to amend the complaint only as to the first cause of action against Sikes.

On February 28, 2001, plaintiff filed a motion for new trial as to the ruling sustaining defendant's demurrer to the fifth cause of action. Plaintiff argued that the trial

court made an error in law in ruling that plaintiff did not have standing to bring a public nuisance claim.

On March 6, 2001, plaintiff filed a third amended complaint, which improperly realleged the fifth cause of action for public nuisance against defendant.

On March 7, 2001, the trial court dismissed plaintiff's second amended complaint as against defendant.

On March 27, 2001, defendant demurred to the fifth cause of action in the third amended complaint on the ground the court had previously sustained, without leave to amend, defendant's demurrer to the fifth cause of action.

On April 9, 2001, plaintiff voluntarily dismissed the third amended complaint as to defendant only, "without prejudice to appeal of dismissal of second amended complaint." Plaintiff also filed on April 9th a notice of appeal to the dismissal of the complaint as against defendant.

On April 18, 2001, the trial court denied plaintiff's motion for new trial.

2. Standard of Review

When reviewing a judgment of dismissal following a trial court ruling sustaining a demurrer without leave to amend, "[w]e accept the factual allegations of the complaint as true [citation] but review the . . . complaint de novo to determine whether the facts as pleaded state a cause of action. [Citation.]"[1]

[1] *Medina v. Hillshore Partners* (1995) 40 Cal.App.4th 477, 481.

A judgment of dismissal entered after the trial court has sustained a demurrer without leave to amend will be affirmed on appeal if any of the grounds stated in the demurrer are well taken.[2]

3. Third Amended Complaint

Defendant argues that plaintiff's appeal is moot because defendant filed a third amended complaint which superseded the second amended complaint. We disagree.

Generally, "An 'amended' complaint supersedes all prior complaints. '"It alone will be considered by the reviewing court."' [Citations.] The original ceases to '"perform any function as a pleading."' [Citations.]"[3]

Although plaintiff filed a third amended complaint realleging the fifth cause of action against defendant, plaintiff did not have leave to do so as to the fifth cause of action since the trial court had just sustained defendant's demurrer to the fifth cause of action without leave to amend. The fifth cause of action was the only claim against defendant alleged in the complaint. Therefore, although the court granted plaintiff leave to amend the complaint as to Sikes, plaintiff was precluded from asserting any additional claims against defendant. Apparently realizing the claim was improper, plaintiff dismissed the third amended complaint only as to defendant, noting he did not intend to waive his right to appeal the judgment of dismissal of the second amended complaint.

---

[2] *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504.

[3] *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 215.

Under these circumstances, realleging the fifth cause of action in the third amended complaint did not render plaintiff's appeal to the second amended complaint moot because the cause of action was void due to the court sustaining defendant's demurrer to the same cause of action in the previous complaint and denying plaintiff leave to reallege the claim. Plaintiff thus has a right to appeal the trial court's ruling eliminating his sole claim against defendant in the second amended complaint.

4. Standing to Maintain Public Nuisance Cause of Action

The trial court sustained defendant's demurrer to the fifth cause of action on the ground plaintiff did not have standing to assert a public nuisance claim because he did not suffer an injury any different from that suffered by the general public.

Plaintiff asserts the trial court erred in making such a ruling. He claims that his injury differed in that he sustained physical injuries as a result of being in a vehicle accident whereas the general public's injury merely consisted of exposure to the risk of such harm as a consequence of RAVE attendees driving on the nearby highways.

A nuisance is broadly defined as "[a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ."[4] A nuisance may be either private or public. "Unlike public nuisance, which is an interference with the rights of the community at large, private nuisance is a civil wrong based on disturbance of rights in

[4] *Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040; Civil Code section 3479.

land. [Citation.] . . . [T]o proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land."[5] It is undisputed here that this case does not involve a private nuisance since it does not involve plaintiff's real property.

The issue here is whether plaintiff has standing to assert a claim for public nuisance. "A private party can maintain an action based on a public nuisance 'if it is specially injurious to himself, but not otherwise.' (§ 3493.) The damage suffered must be different in kind and not merely in degree from that suffered by other members of the public. [Citations.]"[6] Plaintiff thus must allege he sustained a special injury of a character different in kind from that suffered by the general public.

Plaintiff alleges in his complaint that as a result of the RAVE party, the public using the nearby highways, such as U.S. Highway 395, was exposed to the risk of impaired drivers, who were overly tired and under the influence of drugs and alcohol served at the RAVE party. Plaintiff further alleges he had standing to sue because he sustained physical injuries not experienced by the public at large as a result of the public nuisance. We agree. Plaintiff's injuries differed in kind, not just in degree.

---

[5] *Koll-Irvine Center Property Owners Assn. v. County of Orange, supra,* 24 Cal.App.4th at page 1041; Civil Code section 3479.

[6] *Koll-Irvine Center Property Owners Assn. v. County of Orange, supra,* 24 Cal.App.4th at page 1040.

The court in *Buchanan v. Los Angeles County Flood Control Dist.*[7] concluded the death of a child constituted an injury differing in kind from neighbors' exposure to danger and property damage caused by the alleged public nuisance. In *Buchanan* a two-year-old drowned in a hole filled with water along a flood control channel constructed and maintained by the Los Angeles County Flood Control District (FCD). The plaintiff parents of the deceased child argued that the FCD's manner of discharge of water from the nearby dam and maintenance of the fence-revetments constituted a private and public nuisance.

The *Buchanan* court concluded there was both a private nuisance as regards the condition of plaintiffs' own property and a public nuisance as to the danger to the neighborhood created by the FCD's operation and maintenance of the flood channel.[8] The court held that the plaintiffs had standing to assert a public nuisance claim because their child drowned as a result of the unprecedented discharge of water.[9] Likewise, here, plaintiff sustained physical injury as opposed to being merely subjected to the risk of harm.

---

[7] *Buchanan v. Los Angeles County Flood Control Dist.* (1976) 56 Cal.App.3d 757.

[8] *Buchanan v. Los Angeles County Flood Control Dist., supra,* 56 Cal.App.3d at page 768.

[9] *Buchanan v. Los Angeles County Flood Control Dist. , supra,* 56 Cal.App.3d at page 768.

As noted by legal scholar, William Prosser, regarding "special injury" with regard to a public nuisance claim, "[w]here the plaintiff suffers personal injury, or harm to his health, or even mental distress, there is no difficulty in finding a different kind of damage."[10]

The cases cited by defendant for the proposition that plaintiff's injury merely differed in degree and not in kind are not persuasive or on point. The *Medina v. Hillshore Partners*[11] and *Martinez v. Pacific Bell*[12] decisions, relied on by defendant, do not even address the issue of standing and special injury, and thus they are of no assistance in determining the issue of standing in this case. In *Martinez* a person loitering around the defendant's telephone booth shot plaintiff. The plaintiff alleged the booth constituted a public nuisance because it attracted drug dealers and other dangerous individuals. The *Martinez* court, apparently assuming the plaintiff had standing to assert a public nuisance claim due to the plaintiff sustaining physical harm, did not discuss whether the plaintiff sustained a special injury.

In *Medina* the special injury issue also was not addressed since the plaintiff did not even assert a nuisance cause of action.

---

[10] Prosser and Keeton, Torts (5th ed., 1984) section 90, page 648, footnotes omitted.

[11] *Medina v. Hillshore Partners, supra,* 40 Cal.App.4th 477.

[12] *Martinez v. Pacific Bell* (1990) 225 Cal.App.3d 1557.

In *Baker v. Burbank-Glendale-Pasadena Airport Authority*,[13] also cited by defendant, the plaintiffs asserted a public nuisance claim based on airport noise. The court concluded there was no special injury to support a public nuisance claim because the plaintiffs' injury "was one of degree only, in that these plaintiffs were subjected to greater noise levels than those suffered by the general public"[14] due to their proximity to the airport. *Baker* is distinguishable because the *Baker* plaintiffs did not sustain any physical harm. They sustained the same type of injury as the general public but in greater intensity.

In *Koll-Irvine Center Property Owners Assn. v. County of Orange*,[15] cited by defendant, the plaintiff's alleged injury consisted of the risk of danger caused by jet fuel storage tanks at John Wayne Airport. The fuel tanks were located near the plaintiff's home. The *Koll-Irvine* court concluded that "proximity arguably exposes it to a higher degree of these damages, but not to a different kind altogether" from damages sustained by other home and business owners in the area.[16] The plaintiff in *Koll-Irvine* also did not sustain any physical injury.

---

[13] *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1990) 220 Cal.App.3d 1602.

[14] *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1990) 220 Cal.App.3d 1602, 1610.

[15] *Koll-Irvine Center Property Owners Assn. v. County of Orange, supra*, 24 Cal.App.4th 1036.

[16] *Koll-Irvine Center Property Owners' Assn. v. County of Orange, supra*, 24 Cal.App.4th at page 1041.

The *Lind v. City of San Luis Obispo*[17] decision, also relied on by defendant, actually supports a finding of special injury here. In the 1895 *Lind* case, the plaintiff and his neighbors were exposed to the offensive effects of a local cesspool. The language cited by defendant in its appellant's opening brief in support of defendant's contention that plaintiff's injury was one of degree rather than kind is taken out of context and misleading. The statement was made by the trial court finding no special injury, whereas the *Lind* court reversed the trial court ruling, finding that there was a special injury to the plaintiffs based on the stench which deprived plaintiff and his family of the comfortable use of their home and was injurious to their health. The *Lind* court stated, "Surely, all this constitutes a special injury to his private property and private rights incidental thereto, which is not common to the public generally, nor to more than one-sixth part of the population of the small town in which the nuisance is located."[18]

Based on a finding that the plaintiffs in *Lind* sustained a health-related injury, in addition to property-related injuries, the *Lind* court concluded the plaintiffs sustained special injuries sufficient to support standing to bring their public nuisance claim.

Here, the trial court erred in concluding that plaintiff's severe physical injuries were not different in kind from that of the general public. Plaintiff alleged that, while the general public was subjected to the danger of harm from impaired RAVE drivers, and the RAVE drivers interfered with the public's safe use of U.S. Highway 395, plaintiff sustained actual

---

[17] *Lind v. City of San Luis Obispo* (1895) 109 Cal. 340.

[18] *Lind v. City of San Luis Obispo, supra*, 109 Cal. at page 345.

[footnote continued on next page]

physical injuries resulting from an impaired RAVE driver driving head-on into his vehicle. These allegations sufficiently stated an injury "specially injurious" to plaintiff and thus plaintiff had standing to assert his public nuisance claim.

5. Duty and Causation

Although plaintiff has standing to bring his public nuisance claim, we nevertheless conclude he failed to allege adequately a public nuisance claim cause of action due to not alleging duty and causation. In *Martinez* the court likewise concluded that, even assuming without deciding that the phone booth constituted a nuisance, the plaintiff failed to allege a public nuisance cause of action because the nuisance was not the legal or proximate cause of the plaintiff's injuries and there was no duty owed to the plaintiff.

The *Martinez* court noted that, since the plaintiff asserted that the nuisance was caused by the phone company's negligent maintenance and ownership of the booth, the plaintiff must allege facts establishing that the defendant owed the plaintiff a duty of care. The *Martinez* court explained that, generally, there is no duty to control a third party's conduct in the absence of some special relationship creating such a duty.[19] The determination of duty is a question of law. Courts commonly conclude as a matter of law that no duty is owed in situations in which the defendant's responsibility for the activities of third parties is involved.[20]

[footnote continued from previous page]

[19] *Martinez v. Pacific Bell, supra,* 225 Cal.App.3d at page 1567.

[20] *Martinez v. Pacific Bell, supra,* 225 Cal.App.3d at page 1568.

[footnote continued on next page]

Here, plaintiff also claims the nuisance was caused by defendant's negligence, consisting of defendant allegedly negligently operating, as well as permitting, the RAVE party. We thus consider whether plaintiff has sufficiently alleged facts establishing that defendant owed plaintiff a duty of care. While defendant had a special relationship with Sikes, as a RAVE patron, defendant did not have a special relationship with plaintiff which created a duty of care.

The *Martinez* court discussed duty further in connection with the plaintiff's premises liability and negligence claims. The court stated that "'The courts . . . have consistently refused to recognize a duty to persons injured in adjacent streets or parking lots over which the defendant does not have the right of possession, management and control.'"[21] As noted in *Medina*, "In California, a landowner owes a duty to exercise ordinary care in the use and management of his or her land. [Citations.] 'Normally, the duties do not extend to persons outside the land, e.g., on adjacent land or on the highway. [Citations.]' [Citation.] Absent a special relationship, the landowner has no duty to protect members of the public against criminal activities occurring on a public sidewalk or street. [Citation.]"[22] The *Medina* court added that "The imposition of vicarious liability is

---

[footnote continued from previous page]

[21] *Martinez v. Pacific Bell, supra,* 225 Cal.App.3d at page 1563.

[22] *Medina v. Hillshore Partners, supra,* 40 Cal.App.4th at page 481.

particularly disapproved in cases where a landowner is claimed to be liable for the criminal acts of third parties committed on the premises of another."[23]

In *Martinez*, the court rejected the plaintiff's negligence claims on the ground the phone company did not owe the plaintiff a legal duty to prevent third party assailants from robbing the plaintiff in his adjacent parking lot, which the phone company neither owned or controlled.[24] The *Martinez* court noted that "'While the [tortious] conduct of third persons might have been foreseeable, defendant's clear lack of control made it impossible to have instituted preventative measures. Thus, where the absence of control has been unequivocally established, no basis for finding a duty or imposing liability exists.'"[25] Although the owner of real property owes a duty to exercise due care in the management of the property, the courts "'have consistently refused to recognize a duty of persons injured in adjacent streets or parking lots over which the defendant does not have the right of possession, management and control.'"[26]

Here, plaintiff's injury occurred off defendant's property, on a highway over which defendant had no control. Defendant also could not prevent RAVE attendees from leaving the RAVE premises and driving home whenever they chose to do so, just as patrons at a

---

[23] *Medina v. Hillshore Partners, supra,* 40 Cal.App.4th at page 482.

[24] *Martinez v. Pacific Bell, supra,* 225 Cal.App.3d at pages 1563-1564.

[25] *Martinez v. Pacific Bell, supra,* 225 Cal.App.3d at page 1564.

[26] *Medina v. Hillshore Partners, supra,* 40 Cal.App.4th at page 484.

baseball game or concert cannot be detained when such events end. And once the RAVE attendees left the RAVE party, which defendant could not prevent, defendant had no control over their conduct. We thus conclude the complaint allegations establish that defendant did not owe plaintiff a duty of care.

As to causation, in discussing the *Martinez* plaintiff's public nuisance claim, the *Martinez* court concluded that owning and maintaining the phone booth was not the legal or proximate cause of the assault and robbery of the plaintiff on adjacent property. Rather, the independent and intervening intentional act of a third party was.[27]

In reaching this result, the *Martinez* court explained that liability based on nuisance extends only to injury proximately caused by a defendant's conduct, and not to injury proximately caused by the independent intervening acts of third parties.[28] The *Martinez* court further explained that "'the issue of proximate cause ordinarily presents a question of fact. However, it becomes a question of law when the facts of the case permit only one reasonable conclusion.' [Citations.]"[29]

Here, the facts, as alleged, permit only one reasonable conclusion: plaintiff's injuries caused by Sikes crashing head-on into plaintiff's car were due to the intervening and independent acts of Sikes, who drove under the influence of Ecstasy, and Craig Leras,

---

[27] *Martinez v. Pacific Bell, supra*, 225 Cal.App.3d at page 1565.

[28] *Martinez v. Pacific Bell, supra*, 225 Cal.App.3d at page 1565.

[29] *Martinez v. Pacific Bell, supra*, 225 Cal.App.3d at page 1566.

who sold Sikes the Ecstasy. While the sale and consumption of drugs may have occurred at the RAVE, there are no allegations that defendant knowingly permitted or participated in such activity. Rather, the plaintiff alleges defendant provided security at the RAVE party no doubt to deter this very conduct. We conclude that, even assuming, without deciding the RAVE constituted a nuisance, the alleged nuisance is not the legal or proximate cause of plaintiff's automobile accident injuries. The independent and intervening criminal acts of Sikes and Leras were.

As stated in *Martinez*, "We reject appellant's contention that venerable nuisance concepts should be manipulated so as to impose that duty and that vicarious responsibility on the owners of nearby property, who lack the legal or practical ability to control such criminal actions of third parties. To hold as appellant urges in this case would simply improperly impose a remote and insubstantial factor, or a cause out of natural and continuous sequence, as the legal basis for recovery in injury cases alleged to arise from maintenance of a nuisance. We find no reason of precedent or policy justifying such unwarranted extension of vicarious tort liability."[30]

Having determined as a matter of law that plaintiff failed to allege a public nuisance cause of action, we need not consider defendant's remaining alternative theories upon which defendant claims plaintiff's cause of action has no merit.

We further conclude the trial court did not commit reversible error by denying plaintiff's motion for new trial. The plaintiff based his motion for new trial on the theory

---

[30] *Martinez v. Pacific Bell, supra,* 225 Cal.App.3d at pages 1569-1570.

[footnote continued on next page]

that the trial court made an error of law by sustaining, without leave to amend, defendant's demurrer to the public nuisance cause of action based on plaintiff's lack of standing. Any such error in law was harmless since, as stated above, there were other valid grounds for sustaining the demurrer without leave to amend.[31]

6. Disposition

The judgment is affirmed. The defendant is awarded its costs on appeal.

NOT TO BE PUBLISHED

s/Gaut
J.

We concur:

s/McKinster
Acting P. J.

s/Ward
J.

[footnote continued from previous page]

[31] *E. L. White, Inc. v. City of Huntington Beach, supra,* 21 Cal.3d at page 504.